SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT:	HON. BARRY R. OSTRAGER	PART	IAS MOTION 61EFM
	Justice		

---X

CLAUDIA C. LEVY as EXECUTRIX Under the Last Will and Testament of JACQUES M. LEVY, also known as JACQUES LEVY, Deceased, and JACKELOPE PUBLISHING COMPANY, INC.,

Plaintiffs,

- v -

ROBERT ZIMMERMAN, also known as BOB DYLAN, and doing business as RAM'S HORN MUSIC, SPECIAL RIDER MUSIC and/or BOB DYLAN MUSIC CO., UNIVERSAL MUSIC GROUP, INC. and doing business as UNIVERSAL MUSIC GROUP, UNIVERSAL MUSIC PUBLISHING, INC. and doing business as UNIVERSAL MUSIC PUBLISHING GROUP, and JOHN DOES 1-10,

Defendants.

---X

INDEX NO.	650402/2021
MOTION DATE	
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

Plaintiff Claudia C. Levy commenced this action as Executrix under the Last Will and Testament of her husband Jacques Levy, who passed away on September 30, 2004. The co-plaintiff Jackelope Publishing Company, Inc. ("Jackelope") is the music publishing company created by Mr. Levy. It is undisputed that Jacques Levy and defendant Bob Dylan[1] collaborated in the early 1970's to write ten songs, including the well-known song titled "Hurricane", seven of which were included on Dylan's bestselling record album "Desire" released in early 1976 ("the Compositions"). It is also undisputed that Dylan, through his company Ram's Horn Music, entered into a detailed six-page written agreement with Levy, dated as of July 28, 1975, that

[1] Bob Dylan is the stage name used by defendant Robert Zimmerman. In addition to naming Dylan in this suit, plaintiffs have named Dylan's various companies Ram's Horn Music, Special Rider Music, and Bob Dylan Music Co., which together are referred to here as "the Dylan Defendants."

listed in Schedule A the ten Compositions and provided, among other things, for Levy's receipt of 35% of certain defined revenue received by Dylan in connection with the Compositions under certain specified circumstances discussed more fully below ("the 1975 Agreement", NYSCEF Doc. No. 15). It is further undisputed that Levy and/or his Estate and/or Jackelope have consistently received revenue from the defendants over the years, and continuing through today, based on the 1975 Agreement in a total amount approximating $1,000,000.00.

Plaintiffs allege in the Complaint, and defendants do not dispute, that the Dylan Defendants sold their entire catalog of approximately 600 songs, including their complete copyrights, royalty rights, and any and all other rights, to the Universal Defendants for more than $300 million in a widely reported transaction in late 2020 ("the Catalog Sale") and that the ten Compositions were included in the Catalog Sale pursuant to a written agreement between the Dylan Defendants and the Universal Defendants ("the Universal Agreement") (Compl., NYSCEF Doc. No. 1, ¶28)[2]. Plaintiffs commenced this action soon thereafter, in January 2021, contending that the 1975 Agreement entitles plaintiffs to a portion of the proceeds from the Catalog Sale. In their Complaint, plaintiffs assert three causes of action: (1) breach of contract (i.e., the 1975 Agreement) against the Dylan Defendants, seeking at least $1,750,000.00 as plaintiffs' alleged portion of the revenue received by the Dylan Defendants from the Catalog

[2] Plaintiffs in their opposition papers criticized defendants for having failed to attach the Universal Agreement to their moving papers (NYSCEF Doc. No. 46). In reply, defendants indicated they had offered to produce the Universal Agreement conditioned on plaintiffs' agreement to maintain confidentiality but that plaintiffs declined to agree (NYSCEF Doc. No. 47). Before oral argument, the Court urged counsel to agree to production on an "attorney's eyes only" basis, but plaintiffs again declined (NYSCEF Doc. Nos. 51-53). It was not until after oral argument that plaintiffs offered to agree to confidentiality and requested an opportunity to brief the related issues in the motion again, but the Court determined at that point to proceed on the record and avoid delay (NYSCEF Doc. Nos. 54-55). This decision accepts plaintiffs' undisputed allegations about the Universal Agreement as true.

Sale, plus punitive damages; (2) breach of contract against the Universal Defendants based on plaintiffs' alleged status as third-party beneficiaries of the Universal Agreement, seeking at least $1,750,000.00 as plaintiffs' alleged portion of the revenue received by the Dylan Defendants from the Catalog Sale; and (3) tortious interference with contract (i.e., the 1975 Agreement) against the Universal Defendants, seeking the same $1,750,000.00 in alleged damages.

Plaintiffs do not dispute that the Universal Defendants have continued to pay plaintiffs their proportionate share of royalties pursuant to the 1975 Agreement since the Catalog Sale, and the Universal Defendants have repeatedly acknowledged their ongoing obligation to pay plaintiffs those royalties going forward (see Transcript, "TR", pp 5-6, 16, 21, 23, 25, 28; see also Defendants' Memoranda of Law at NYSCEF Doc. Nos. 12 and 47). However, both the Dylan Defendants and the Universal Defendants vigorously assert that plaintiffs have no right to any portion of the proceeds of Dylan's complete sale of his own vested copyrights and other rights.

Before the Court at this time is a joint motion by the Dylan Defendants and the Universal Defendants for an order dismissing this action in its entirety pursuant to CPLR 3211(a)(1) and (7) based on documentary evidence (i.e., the 1975 Agreement) and failure to state a cause of action. Extended oral argument was held on the record via Microsoft Teams on July 19, 2021 (see Transcript at NYSCEF Doc. No. 56). In accordance with the proceedings on the record and this decision, the motion is granted and the action is dismissed.

<u>The Standard of Review</u>

The standard of review for determination of a pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) and (7) is well-established based on *Leon v Martinez,* 84 NY2d 83 (1994) and its progeny. Whereas the pleadings shall be liberally construed and the allegations accepted as true when determining whether a cause of action has been stated pursuant to CPLR 3211(a)(7), "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration …" *Skillgames, LLC v Brody,* 1 AD3d 247, 250 (1st Dep't 2003) (citation omitted). Additionally, the Court may dismiss a claim pursuant to CPLR 3211(a)(1) where the "documentary evidence submitted establishes a defense to the asserted claims as a matter of law …" *Leon,* 84 NY2d at 88; *see also 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5-6 (1st Dep't 2004) (dismissing action pursuant to CPLR 3211(a)(1) where the terms of the contract unambiguously contradicted the allegations supporting plaintiff's breach of contract claim, "regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim").

Where, as here, the claims sound in breach of contract, the "[i]nterpretation of the contract is a legal matter for the court … and its provisions establish the rights of the parties and prevail over conclusory allegations of the complaint …" *805 Third Av. Co. v M.W. Realty Assoc.,* 58 NY2d 447, 452 (1983) (citations omitted). Further, where the Court finds that the contract is unambiguous on its face and that the intent of the parties can be discerned from the plain language within the four corners of the contract by applying the applicable canons of construction, the Court may not consider parol evidence. "It is well settled that 'extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face' …" *W.W.W. Assoc. v Giancontieri,* 77 NY2d 157, 163 (1990) (citation omitted); *see also, Evans v Famous Music Corp.,* 1 NY3d 452,458 (2004) ("It is well settled that [the court's] role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract. If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further").

The First Cause of Action for Breach of the 1975 Agreement is Dismissed

Upon review of the 1975 Agreement and the competing arguments, the Court finds the Agreement is clear and unambiguous on its face when read as a whole. For the reasons explained here, the Court determines that the plain meaning of the 1975 Agreement is that the Dylan Defendants owned all copyrights to the Compositions, as well as the absolute right to sell the Compositions and all associated rights, subject only to plaintiffs' right to receive the compensation specified in the 1975 Agreement, which does not include any portion of the proceeds from Dylan's sale of his own rights to the Universal Defendants.

The analysis necessarily begins with a review of the terms of the 1975 Agreement, which the parties extensively negotiated with the assistance of counsel. The Agreement is "by and between RAM'S HORN MUSIC … (hereinafter referred to as 'Publisher') and Jacques Levy… (hereinafter referred to as 'Employee')."[3] The first paragraph explicitly defines the relationship between the parties as an employment relationship, stating that:

> Publisher [Dylan's company Ram's Horn Music] hereby employs Employee [Jacques Levy] as its employee-for-hire and Employee accepts such employment to write the lyrics of certain original musical compositions, which lyrics shall be co-written by and with Bob Dylan (hereinafter referred to as the "Compositions") …

The Compositions are listed in Schedule A to the Agreement as the ten songs that Levy and Dylan had co-written shortly before the Agreement was signed. The Agreement refers to Levy as an "Employee" approximately 84 times.

The Agreement at ¶2 broadly grants Dylan complete ownership of the Compositions and all associated rights as owner and author, stating in relevant part (with emphasis added) that:

[3] The Court has omitted the addresses. The address for Levy is c/o his attorney. In discussing the Agreement in this decision, the Court may use "Dylan" in place of Ram's Horn or Publisher.

> It is understood and agreed that ***the Compositions shall automatically be and become sole property of Publisher [Dylan], everywhere and forever, with all copyrights therein*** and all renewals and extensions thereof, throughout the world. ***Employee [Levy] hereby sells, assigns, transfers and sets over unto Publisher [Dylan] all Employee's right, title and interest in and to the Compositions (lyrics, music and titles)*** and in and to each and every arrangement, version and adaptation thereof, together with the worldwide copyrights thereof, and renewal copyrights thereof, and the right to secure copyrights, extensions of copyrights, and renewals of copyrights, therein throughout the entire world, and ***all Employee's [Levy's] rights of whatsoever nature, both legal and equitable therein, thereto and thereunder***, including but not limited to, the sole and exclusive world-wide publication, mechanical instrument, electrical transcription, and motion picture and television synchronization rights, grand rights and/or stage rights of every and any nature, and the right of public performance for profit by any and all means and through any and all media, ***and all other rights now known or hereafter to become known. All Employee's rights in the Compositions shall vest in Publisher immediately upon their creation***. For the foregoing purposes, ***Publisher shall be deemed the author thereof with respect to the material written by Employee hereunder, with Employee acting as Publisher's employee-for-hire hereunder***. … Publisher shall determine in its sole discretion whether and in what manner to exploit the sales and uses of the Compositions or to refrain therefrom.

The Agreement at ¶9 reinforces Dylan's absolute "***right to assign, transfer, sell*** or otherwise dispose of the Compositions and all copyrights … ***subject, however, to the payment of compensation to Employee as herein provided***" (emphasis added). Levy's compensation rights are defined and expressly limited by the terms of the Agreement, which states in ¶6 that "***Employee shall not be entitled to receive any compensation or remuneration other than as in this Agreement specifically provided***" (emphasis added). Levy's right to "compensation" related to the Compositions is described in ¶7, and ¶7(a) defines that compensation as consisting of:

> Thirty-five (35%) percent of any and all income earned by the Compositions and actually received by the Publisher from mechanical rights [to reproduce songs on CDs and digital formats], electrical transcriptions [for use of a song for public broadcast such as radio], reproducing rights [for use in consumer products such as ring tones and music boxes], motion picture synchronization and television rights, and all other rights therein, (expressly excluding any income or royalties earned in respect of printed editions of the Compositions) in the United States and Canada.*

Citing *In re Cellco Partnership,* 663 F. Supp. 2d 363 (S.D.N.Y. 2009) and *Greenfield v Philles Records*, 98 NY2d 562 (2002), defendants assert that the income-generating rights defined in ¶7(a) are the primary types of music licensing rights, suggesting the parties' intent to limit Levy's compensation to 35% of royalties and similar monies received by Dylan for licensing, as opposed to the proceeds of Dylan's sale of his copyrights to the Universal Defendants. This interpretation is reinforced by additional language in ¶7(a) that authorizes the Publisher to "direct its licensee to pay the aforesaid income directly to Employee or his designee."

In sum, defendants compellingly argue based on the plain language in the 1975 Agreement that the Agreement unambiguously limits plaintiffs' compensation rights to 35% of monies received by Dylan for licensing rights granted to third-parties for the performance and use of the Compositions but not for any portion of the proceeds from Dylan's sale of his complete copyrights related to the Compositions that were explicitly vested in him alone pursuant to the express terms of the 1975 Agreement.

Plaintiffs have offered voluminous opposition papers to argue otherwise. First and foremost, plaintiffs urge the Court to reject the Agreement's "employee-for-hire" designation of Levy as "not dispositive" and to instead recognize Levy as a "joint author" of the Compositions entitled to a percentage of the proceeds of the Catalog Sale (see Memorandum in Opposition, NYSCEF Doc. No. 46, at p 2 ff). In support of their argument, plaintiffs offer three affidavits. The first is from Larry Jaffee, a New York based writer in the music business who wrote two articles in the early 1990's based on his interviews with Jacques Levy (NYSCEF Doc. No. 28). Jaffee cites portions of his articles which suggested that Levy and Dylan had begun their song-writing relationship rather spontaneously in or about May of 1975 as a casual "collaboration" and not as an employment relationship.

Next plaintiffs offer the affidavit of Claudia Levy, the spouse of Jacques Levy for 24 years and the Executrix of his Will (NYSCEF Doc. No. 31). Ms. Levy's recollection of events based on her interactions with Dylan and Levy is consistent with Jaffee's recitation of events. In her affidavit, Ms. Levy describes Mr. Levy as "an incredibly creative and educated person" with a PhD in psychology who practiced clinical psychology and taught English at Colgate University and who was an "extremely accomplished and renowned songwriter and avant-garde theater director" for various well-known artists when he began collaborating with Dylan.

But plaintiffs rely most heavily on the 35-page affidavit of Bob Kohn, who describes himself as "an expert on copyright law as it is applied to the music business," "a transactional attorney for music industry clients," "an expert witness on customs and practices in the music business," and the author of a treatise entitled *Kohn On Music Licensing* (NYSCEF Doc. No. 36). Based on his analysis of the Copyright Act of 1909 and "common law copyright" in effect when the Compositions were co-written in or about May of 1975, Kohn opines that the Compositions were "joint works" of Levy and Dylan with the evidence suggesting "joint authorship" and a shared "undivided interest" in the songs, rather than an "employee-for-hire" relationship as the 1975 Agreement and defendants purport to claim.[4]

In an exercise later criticized by defendants in their reply memorandum (at p 11) as "inadmissible and egregious," "incorrect and misguided," and "an improper attempt to circumvent this Court's word limits for legal briefs and usurp this Court's role of interpreting contract language," Kohn offers his own interpretation of the provisions in the 1975 Agreement.

[4] The analysis is based in part on Kohn's description of the Compositions as "unpublished works" when written, which were not published until the Fall or Winter of 1975-76 (***after*** the Agreement was signed) when either a printed edition or the record album "Desire" was released with the Compositions (see ¶7). Kohn also relies on the current Copyright Act of 1976, but the 1976 Act is irrelevant as it did not take effect until January 1, 1978, according to Kohn (see ¶8).

Beginning with the definition of Levy's compensation in ¶7(a) of the Agreement (quoted at p 6 above), Kohn argues that the reference to 35% of "any and all income" and the reference to "all other rights therein" requires the Court to include income related to authorship rights, including copyrights, and not merely to licensing. He further argues that the reference in the parenthetical to "income or royalties" suggests an intent to include income beyond licensing royalties.

Plaintiffs also attribute great significance to the handwritten interlineation tied to the asterisk in ¶7(a) quoted above. That provision states:

> Without limiting the generality of the foregoing, if rights to a Composition are acquired by a third party for use for the basis of a screenplay, teleplay or dramatic work, Employee shall be entitled to 35% of purchase price paid to Publisher for acquisition of such rights.

According to Kohn (at ¶33), the initial phrase "[w]ithout limiting the generality of the foregoing" refers "back to the kinds of 'income … from rights' to which Levy is entitled to a payment of 35%." He further argues that the use of the words "rights" and "purchase price paid … for acquisition" defeats defendants' claim that ¶7(a) provides for compensation limited to licensing royalties and does not include sales proceeds. Lastly, Kohn provides a lengthy analysis for his opinion that the assignment clause at ¶9 discussed above cannot mean that Levy assigned his copyrights or other ownership or authorship rights to Dylan because Levy automatically assigned any such rights to his company Jackelope when the Compositions were written, which is purportedly confirmed by Jackelope's signature at the end of the Agreement.

As indicated above, the Court finds that the 1975 Agreement is unambiguous and that defendants correctly construe the plain language in the Agreement as precluding plaintiffs' claim to any portion of the proceeds of Dylan's sale of his complete copyrights and royalty rights. Consistent with the standard of review discussed above, the Court cannot consider plaintiffs' offer of extrinsic evidence to alter the meaning of the terms of the Agreement, particularly when the meaning urged by plaintiffs would grant them a windfall consisting of a portion of the proceeds of Dylan's sale of his own copyrights without any change whatsoever in plaintiffs' continued right to royalties under the Agreement. But even if the Court were to consider the evidence, the Court finds plaintiffs' arguments unavailing.

The comments offered by Ms. Levy and Jaffe about the relationship between Dylan and Levy and their song-writing collaboration are of no moment, as the two parties entered into a detailed agreement, with the assistance of counsel, after the Compositions were written that sets forth the rights and obligations of the parties as of July 28, 1975. And Bob Kohn improperly usurps the Court's function to interpret the Agreement by cherry-picking words and phrases and assigning them meanings that ignore the surrounding words and are inconsistent with the 1975 Agreement when read as a whole. As Chief Judge Judith Kaye eloquently explained in *Kass v Kass,* 91 NY2d 554, 566 (1998): "Particular words should be considered not as if isolated from the context but in the light of the obligation as a whole and the intention of the parties as manifested thereby."

For example, Kohn's reliance on the phrase "any and all income" earned, as set forth in the definition of compensation in ¶7(a), ignores the specific list of income categories that follows that phrase. The list includes typical licensing rights such as reproducing rights and televisions rights. "[U]nder the principle of *ejusdem generis,* when a general phrase [such as any and all] follows a list of specific terms, the general phrase must be interpreted to refer to items of the same ilk as those specifically listed." *Malmsteen v Universal Music Grp.,* 940 F. Supp. 2d 123, 133 (SDNY 2013). And the phrase "all other rights therein" at the conclusion of the list logically refers back to the list and implies no intent to expand it beyond royalty rights to include a right to sales proceeds.

The reference to “royalties” and “licensees” lends further support to defendants’ assertion that the compensation in ¶7(a) is limited to income from licensing and not Dylan’s copyright sale. A right as significant as the purported right to a percentage of the proceeds from Dylan’s sale of his copyrights and royalty rights is a material term that the parties would have expressly stated in the Agreement had they intended to include it. *See Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.,* 93 NY2d 584, 589 (1999) (definite mutual assent is required for material terms of a contract). Contrary to plaintiffs’ contention, the parenthetical phrase “expressly excluding any income or royalties earned in respect of printed editions of the Compositions” was intended as a broad exclusion of printed editions (i.e., sheet music) from compensation, not as a means to expand it by referring to “income or royalties” in the alternative.

Plaintiffs similarly assign a distorted meaning to the handwritten interlineation in ¶7(a). To the extent that provision references the “purchase price paid”, it is limited to “rights to a Composition [that are] acquired by a third party for use for the basis for a screenplay, teleplay or dramatic work.” The third party is obviously not purchasing all rights to the Composition but is purchasing a limited right to use the song for the specified purpose. Such a narrow expansion of the compensation rights specified in ¶7(a), all related to licenses, cannot reasonably be construed to grant plaintiffs the extremely valuable right to 35% of the proceeds of Dylan’s copyright sale.

Wholly unreasonable and unpersuasive is plaintiffs’ contention that Levy had no authority to agree in ¶2 that “the Compositions shall automatically be and become sole property of publisher [Dylan]” or to confirm in ¶9 that Dylan had the “right to assign, transfer, sell or otherwise dispose of the Compositions and all copyrights” because Levy’s rights had been automatically assigned to his company Jackelope in the first instance. Such a contention is directly contradicted by ¶10, which confirms that:

> Employee has not heretofore sold, assigned, pledged, mortgaged, hypothecated or otherwise disposed of or encumbered any of the Compositions or the material written by Employee hereunder or any copyrights or copyright renewals or extensions thereof, or any right, title or interest therein.

Contrary to Kohn's claim, Jackelope's signature at the conclusion of the Agreement expressly limits Jackelope's consent only "insofar as the terms and conditions of the foregoing employment agreement relate specifically to Jackelope …" Jackelope is specifically mentioned in ¶8(d) as being a publisher affiliate of BMI and to entitle Jackelope to receive directly from BMI 35% of the publisher share of performance income. The signature cannot reasonably be used to expand the terms of Levy's compensation rights under the Agreement in the manner Kohn urges.

In sum, the "expert" affidavit offered by Bob Kohn purporting to interpret the 1975 Agreement is inadmissible to offer an opinion as to the legal rights and obligations of the parties under the unambiguous contract (*see, e.g., Colon v Rent-A-Center,* 276 AD2d 58, 61 (1st Dep't 2000). Kohn's opinion is, in any event, unpersuasive as it distorts the plain language in the Agreement. Defendants' limited citation in their moving papers to Kohn's treatise does not change that result, as the Court is not relying on any extrinsic evidence to interpret the Agreement.

The cases cited by plaintiffs do not mandate a contrary result. In *Leeds v Harry,* 2015 WL 609878 (Sup. Ct., NY Co. 2015), the trial court applied the same rules of contract interpretation espoused here to determine "the parties obligations and intentions as manifested in the entire agreement and … afford the language an interpretation that is sensible, practical, fair, and reasonable" consistent with *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.,* 13 NY3d 398, 404 (2009) and the other cases cited therein. After so doing, the court found the contract ambiguous and denied summary judgment based on triable issues of fact. But because the provisions in the agreement related to defendant Harry (a/k/a Blondie) are not at all similar to those in the 1975 Agreement at issue here, the case provides no guidance beyond the rules of contract interpretation. Similarly, plaintiffs' reliance on *Evans v Famous Music Corp.,* 1 NY3d 452 (2004) is misplaced. Finding the music contract ambiguous, the court considered custom and practice to interpret the contract and grant defendants summary judgment dismissing the breach of contract cause of action. In contrast here, the Court has no need to resort to custom and practice because the 1975 Agreement, as plainly written, does not entitle plaintiffs to any portion of the proceeds of Dylan's sale of his copyrights and royalty rights.

Accordingly, the First Cause of Action against the Dylan Defendants for breach of the 1975 Agreement is dismissed based on the documentary evidence, which provides a complete defense as a matter of law that demonstrates that plaintiffs have not stated a viable cause of action. Any request by plaintiffs to replead is denied as futile. The Complaint specifically cites Sections 7 and 9 of the 1975 Agreement, and plaintiffs directly addressed those provisions and any other relevant provisions of the Agreement at length in their opposition papers and during oral argument. Further, as discussed above, any proposed copyright claim on behalf of Jacques Levy would be extinguished by the terms of the 1975 Agreement, particularly Section 10(d) wherein Levy explicitly confirmed his "full right, power and authority to … grant to and vest in [the Dylan Defendants] all of [Levy's] rights in and to the Compositions and the copyrights and any extensions or renewals therein and thereto." [5]

---

[5] Had the First Cause of Action survived, the Court would have dismissed the request for punitive damages. Punitive damages are only available when the conduct associated with the breach of contract is actionable as an independent tort and is sufficiently egregious that it demonstrates "such wanton dishonesty as to imply a criminal indifference to civil obligations" and is also "aimed at the public generally" such that the remedy vindicates public, and not just private, rights. *Walker v Sheldon,* 10 N.Y.2d 401, 404–405 (1961*); see also, Rocanova v*

The Second Cause of Action for Breach of the Universal Agreement is Dismissed

In the Second Cause of Action, plaintiffs assert a breach of contract claim against the Universal Defendants, seeking to recover their "prorated share of the income generated from the Catalog Sale" which they calculate to be at least $1,750,000.00 by applying to the proceeds of the Catalog Sale the 35% formula in the 1975 Agreement as applied to the ten Compositions (Comp. ¶¶ 50-55). While acknowledging they are not signatories to the Universal Agreement allegedly breached, plaintiffs contend they are "third-party beneficiaries" or, alternatively, "implied third-party beneficiaries" of the Catalog Sale between the Dylan and Universal Defendants and the related agreement executed by those parties (i.e., the Universal Agreement).

The cause of action must be dismissed because, as defendants correctly assert, plaintiffs do not qualify as third-party beneficiaries of the Universal Agreement. To maintain a claim as third-party beneficiaries, plaintiffs must establish: "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [plaintiffs'] benefit and (3) that the benefit to [plaintiffs] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [plaintiffs] if the benefit is lost." *Mendel v Henry Phipps Plaza W., Inc.,* 6 NY3d 783, 786 (2006), *quoting Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 (1983).

In a case relied upon by plaintiffs themselves in their opposition brief (at p 19), the Court of Appeals emphasized that it had "sanctioned a third party's right to enforce a contract in two situations: when the third party is the only one who could recover for the breach of contract or when it is otherwise clear from the language of the contract that there was 'an intent to permit

---

Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603, 613 (1994). Plaintiffs' breach of contract claims do not meet that standard.

enforcement by the third party'." *Dormitory Auth. of the State of N.Y. v Samson Constr. Co.,* 30 NY3d 704, 710 (2018), *quoting Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 (1985). There, the Court of Appeals modified the Appellate Division and found summary judgment should have been granted dismissing the City's third-party beneficiary claim under the architectural services contract between the NYS Dormitory Authority and Perkins Eastman Architects, P.C. related to the construction of a laboratory. The Court found that, while the City was an incidental beneficiary of the contract because the lab was being built for use by the City's Office of the Chief Medical Examiner, the City was not the only party who could recover for a breach of the contract between the State Authority and the architect. Nor did the architectural services contract expressly name the City as an intended third-party beneficiary or authorize the City to enforce any obligations under the contract. Thus, the City did not qualify as a third-party beneficiary entitled to enforce the contract made by and between the other parties.

That reasoning applies here to mandate the dismissal of plaintiffs' third-party beneficiary claim. Plaintiffs do not, and cannot, claim they are the only party who could recover for breach of the Universal Agreement, as the Dylan Defendants undeniably could sue the Universal Defendants for any nonpayment of monies due or other breach of that Agreement. Plaintiffs instead rely on the second possible situation delineated by the *Dormitory Authority* court of an implied intent to permit enforcement of the contract by a third party.

For that claim plaintiffs cite ¶9 of the 1975 Agreement, which plaintiffs interpret to mean that "Dylan had the right to sell the copyrights, subject to 'the payment of compensation to Employee [Levy] as herein provided'." (Memorandum in Opposition at p 20). But that provision does nothing more than reinforce the provision that the 1975 Agreement is binding on Dylan's assigns. Indeed, ¶16 of the 1975 Agreement expressly provides that the Agreement is binding on

Publisher's "designees, successors, assigns or its associated or affiliated companies." The provision does not alter or expand Levy's compensation rights.

The third-party beneficiary claim also fails because plaintiffs are not truly seeking to enforce the Universal Agreement. Rather, plaintiffs are seeking to enforce their compensation rights under the 1975 Agreement, which plaintiffs claim include the right to the sales proceeds. Defendants acknowledge in their Reply Memorandum (at p 12), as they previously acknowledged, that the Universal Defendants assumed Dylan's obligations under the 1975 Agreement. Plaintiffs do not claim that the Universal Agreement modified plaintiffs' rights under the 1975 Agreement or that the Universal Defendants have somehow disavowed their obligations under the 1975 Agreement.

The dispute between the parties is instead solely whether the 1975 Agreement, standing on its own, entitles plaintiffs to a share of the proceeds received by Dylan for the sale of his Song Catalog, including all of his copyrights and royalty right. Thus, as defendants correctly note, plaintiffs would enforce any breach of their compensation rights by suing under the 1975 Agreement, which the Universal Defendants assumed, not by suing under the Universal Agreement.[6] Thus, the Second Cause of Action premised on plaintiffs' alleged third-party status under the Universal Agreement must be dismissed.

<u>The Third Cause of Action for Tortious Interference with Contract is Dismissed</u>

In their Third Cause of Action, plaintiffs allege that the Universal Defendants tortiously induced the Dylan Defendants to breach the 1975 Agreement (Compl ¶¶56-61). Specifically,

---

[6] Because plaintiffs are relying in their Second Cause of Action on the 1975 Agreement and the undisputed assumption by the Universal Defendants of Levy's rights under the 1975 Agreement, the previously discussed dispute about the production of the Universal Agreement is irrelevant to the third-party beneficiary analysis. Plaintiffs' third-party beneficiary claim also fails because, for the reasons stated above, the 1975 Agreement has not been breached.

plaintiffs assert that the Universal Defendants "wrongfully, intentionally and without justification induced the Dylan Defendants to breach the Agreement with Plaintiffs by advising and/or instructing the Dylan Defendants not to render any revenue, income and/or payments to Plaintiffs in connection with the Catalog Sale." Plaintiffs further contend that Dylan would not have breached the Agreement "but for" the wrongful acts of the Universal Defendants, and they seek to recover the same damages of approximately $1,750,000.00 claimed in the other causes of action.

The cause of action is dismissed. "A claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages." *Foster v Churchill,* 87 N.Y.2d 744, 749-50 (1996), *citing Israel v Wood Dolson Co.,* 1 NY2d 116, 120. Plaintiffs can of course satisfy the first two elements, as the Universal Defendants were well aware of the contract between Levy and Dylan, but they cannot satisfy the remaining two elements.

The most obvious deficiency in plaintiffs' tortious interference claim is that there was no breach of the contract (i.e.., the 1975 Agreement) for the reasons previously stated. Another fatal flaw is plaintiffs' failure to plead any facts that would establish that the Universal Defendants caused the alleged breach of contract by the Dylan Defendants, resulting in damages, and that no breach would have occurred "but for" Universal's conduct. *See, Cantor Fitzgerald Assocs., L.P. v Tradition N. Am., Inc.,* 299 AD2d 204 (1st Dep't 2002) (affirming dismissal of plaintiff's tortious interference claim based on a failure to establish the "essential element" of "but for" causation). The Complaint here contains nothing more than the vague allegations noted above.

In opposition, plaintiffs seek to distinguish defendants' cases. More significantly, though, plaintiffs contend they should be permitted to conduct discovery to obtain facts to support their cause of action, which they believe has merit in light of other purported conduct by Dylan over the years that allegedly demonstrated Dylan's failure to give full credit to Levy for the Compositions in public performances. But discovery is not permissible as a 'fishing expedition" to ascertain whether a cause of action exists. *Cf., Bishop v Stevenson Commons Assoc., L.P.,* 74 AD3d 640, 641 (1st Dep't 2010) (Court has broad discretion to deny pre-action discovery when the pleadings fail to demonstrate the cause of action has some merit). As plaintiffs here have failed to offer a single, nonconclusory allegation to support their tortious interference claim, the claim should not be allowed to continue past the pleadings stage, especially since plaintiffs will be unable to demonstrate the key element of a breach of the 1975 Agreement.

In sum, the 1975 Agreement vested in Dylan complete ownership and control of the copyrights to the Compositions and limited Levy's rights to 35% of the specified compensation, which consisted primarily of licensing royalties and in no way can be construed to include a portion of Dylan's sale of his own copyrights and royalty rights. Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss is granted in its entirety, and any and all claims and causes of action asserted in this action against any and all Defendants are dismissed with prejudice. The Clerk is directed to enter judgment accordingly.

Dated: July 30, 2021

Barry Ostrager

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	X CASE DISPOSED		☐ NON-FINAL DISPOSITION	
	X GRANTED	☐ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE